DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 96-98
Inter-Carrier Compensation	)	
for ISP-Bound Traffic	)	

REPLY COMMENTS OF FOCAL COMMUNICATIONS CORPORATION

Richard Metzger
Vice President, Regulatory Affairs
and Public Policy
Focal Communications Corporation
1120 Vermont Ave, NW
Washington, DC. 20005
(202) 293-0142

Richard M. Rindler
Patrick J. Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Counsel for Focal Communications, Inc.

Dated: April 27, 1999

TABLE OF CONTENTS

SUMMARY

The initial comments in this rulemaking clearly demonstrate that the Commission should adopt its tentative conclusion allowing the states to continue supervising the issue of intercarrier compensation for ISP-bound traffic. The attacks by the ILECs on the tentative proposal are uniformly unsuccessful:

- Despite their cries of economic distress, ILECs are enjoying unprecedented economic success.

- The existence of rebating merely shows that serving ISPs is profitable. Indeed the ILEC' own use of rebates demonstrates that what they really don't like is losing a fair fight.

- The cost studies submitted by Ameritech are meaningless because they ignore the substantial amounts of intrastate ISP-bound traffic that exists, traffic which is fully compensated pursuant to local exchange tariffs.

- Inasmuch as the 8th Circuit has already rejected the ILECs' claims that the Commission can not allow the states to set rates for dial-up ISP calls, the Commission plainly also has the authority to allow states to supervise intercarrier compensation as well as the end user rates for this traffic.

- The ILEC tub-thumping about "non-delegation" precedent is a classic strawman argument. The tentative proposal does not shift Commission authority to the states (the essence of delegation). Rather, it carves out an area in which the Commission will not act, thereby allowing any willing states to carry out the regulatory task themselves.

- The ILECs' attacks on the applicability of Section 252(i) to intercarrier compensation for ISP-bound dialup traffic are unfounded in light of the affirmance by a unanimous Supreme Court of the Commission's rules implementing Section 252(i), and the fact that the Commission could also adopt the substance of Section 252(i) as an independent anti-discrimination requirement applicable to contracts involving intercarrier compensation for this traffic even if Section 252(i) itself were not implicated.

- The ILECs' requests for separations and price cap relief are uniformly without merit. In particular, the claim that ISP-bound dialup calls cannot be separated for separations purposes is completely without foundation. The interstate percentages for this traffic can be measured and implemented in the same manner as the local loop is allocated between the federal and state jurisdictions.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 99-68
Inter-Carrier Compensation	)	
for ISP-Bound Traffic	)	

REPLY COMMENTS OF FOCAL COMMUNICATIONS CORPORATION

Focal Communications Corporation ("Focal") submits this reply to the initial comments filed in response to the *NPRM* issued in this proceeding.[1]

I. THE CURRENT FRAMEWORK GOVERNING INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC SHOULD BE CONTINUED

Focal and many other commenters in this proceeding urge the Commission to maintain the current framework governing intercarrier-compensation for ISP-bound traffic.[2] Under that framework, intercarrier compensation for this traffic is subject to state regulatory oversight and the same overarching rate level and rate structure requirements that are applicable to reciprocal compensation for local traffic generally. Thus, intercarrier compensation for this traffic has been subject to negotiation and arbitration under Sections 251 and 252 of the Act, and interconnection agreements make no distinction between ISP-bound traffic and other traffic for

---

[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic,* Declaratory Ruling and Notice of Proposed Rulemaking, CC Docket Nos. 96-98, 99-68, FCC 99-38, released February 26, 1999 ("*Dial-Up Order*" *or* "*NPRM*"). Focal filed initial comments on April 12, 1999.

[2] See Comments of ALTS; *see* Comments of AT&T; *see* Comments of TRA; *see* Comments of CompTel; *see* Comments of TWTC; *see* Comments of Cox; *see* Comments of Intermedia; *see* Comments of ITAA; *see* Comments of Sprint; *see* Comments of GST; *see* Comments of CT Cube/Leaco; *see* Comments of MediaOne; *see* Comments of Verio; *see* Comments of Cablevision Lightpath; *see* Comments of MCIWorldcom; *see* Comments of CIX; *see* Comments of JSI.

purposes of intercarrier compensation. Focal explains in these reply comments why there is no economic, legal, policy, or procedural justification for overhauling on a going-forward basis the current treatment of ISP-bound traffic, or for treating this traffic any differently than other traffic subject to reciprocal compensation. Accordingly, the Commission should adopt its tentative conclusion in the *NPRM* that on a going-forward basis intercarrier compensation for this traffic will remain subject to state supervision under the Sections 251 and 252 negotiation arbitration process, and should require that intercarrier compensation for this traffic be the same as for reciprocal compensation for local traffic generally.

II. THERE IS NO ECONOMIC JUSTIFICATION WHY INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC NEED BE DIFFERENT THAN RECIPROCAL COMPENSATION FOR OTHER TRAFFIC

A. Incumbent LECs Are Enjoying Record Earnings

As an initial point, Focal urges the Commission in evaluating comments in this proceeding to consider the fact that incumbent LECs are enjoying record earnings. Ameritech, for example, recently reported that its earnings have increased 19.5% in the first quarter driven by rapid growth in data communications.[3] First quarter revenues from data services increased 40% and represented nearly half of its total revenue growth.[4] Other major carriers reported similarly spectacular growth rates.[5] Given these astonishing figures, attributable apparently in

---

[3] Current Report on Form 8-K of Ameritech, as filed with the U.S. Securities and Exchange Commission on April 20, 1999. These results marked Ameritech's 22nd consecutive quarter of double-digit profit growth.

[4] *Id.*

[5] SBC reported that its fourth quarter earnings per share increased 20 percent. Current Report on Form 8-K of SBC, as filed with the U.S. Securities and Exchange Commission on January 21, 1999. Bell Atlantic's earning increased 10.6 percent. Current Report on Form 8-K of Bell Atlantic, as

large part to the growth of consumers increasing desire to connect to the Internet, the Commission should view with a healthy skepticism incumbent LEC's complaints that they are being harmed by their arrangements with competitive LECs where both carriers are involved in providing access to ISPs. In fact, incumbent LECs are profiting handsomely from growth in Internet related services, particularly growth in second lines.

B. Competitive LECs Experience the Same Costs as for Local Traffic Generally

As noted by Focal and other commenters in this proceeding,[6] competitive LECs experience the same costs in receiving an ISP-bound call from an incumbent LEC, and then transporting, switching, and handing-off this traffic to an ISP, as when it performs the same functions and terminates other local calls to an end user.[7] Because the costs are the same, it would create economic distortions and inefficiencies if this traffic were compensated on a different basis than other local traffic.

C. Competitive LECs Incur Costs that Must be Compensated

Competitive LECs incur appreciable costs in handling ISP-bound calls handed off from incumbent LECs. Indeed, the cost studies submitted by Ameritech in its initial comments, while not proving any other point (see Part II.E., *infra*), nonetheless affirm that competitive LECs

---

filed with the U.S. Securities and Exchange Commission on April 22, 1999. BellSouth's earning increased by 15 percent. Current Report on Form 8-K of BellSouth, as filed with the U.S. Securities and Exchange Commission on April 19, 1999.

[6] Comments of TWTC at 9; Comments of GST at 17; Comments of ALTS at 15-18; Comments of Verio at 5.

[7] Focal assumes here solely for purposes of these reply comments that dial-up calls to ISPs are jurisdictionally interstate. Focal reserves the right to contest the Commission's jurisdictional determination in the *Dial-Up Order*.

relieve incumbent LECs of considerable additional incremental costs in handling dial-up calls to ISPs.[8] Moreover, since Focal and most other commenters urge that intercarrier compensation for handling this traffic be subject to a TELRIC cost standard, regardless of whether handled by the competitive or incumbent LEC, Focal submits there is no justification in economic or pricing theory for setting the intercarrier compensation for this traffic differently than for other local traffic.

Furthermore, competitors should neither be penalized nor subsidized in their pursuit of customers. The only way to avoid turning intercarrier compensation for ISP-bound dial-up traffic into an anti-competitive penalty is to permit competitive LECs to recover their costs. Refusing to permit competitive LECs to recover their costs (which do not differ from the costs of handling other local traffic) would have the perverse effect of conferring an economic benefit on incumbent LECs (not having to incur the costs of transporting and "terminating" this traffic to the ISP) as a consequence of losing the ISP customer to the competitive LEC.

D. Rebates Do Not Demonstrate that Current Reciprocal Compensation Levels Are Inappropriate

The Commission should reject incumbent LECs' claims that the existence of rebates to ISPs somehow justifies or requires separate treatment for this traffic. Rebates are nothing more than price competition, and incumbent LECs have the same ability and willingness to use rebates as a way of attracting customers.[9] The fact that a LEC uses rebates as a marketing tool does not

---

[8] *See* Comments of Ameritech, Attachment A at 2.

[9] Frontier has recently acknowledged to the New York Public Service Commission that it rebates reciprocal compensation for ISP-bound traffic. Comments submitted March 19, 1999, in Cases 98-Cp1273 and 98-C-1479 at p.4. Cortel, a marketing agent for Bell Atlantic, has

show that reciprocal compensation is inherently "uneconomic" or excessive. It only shows the compensation level is at least sufficient to cover incremental costs, a reasonable allocation of overhead, and a reasonable profit. In particular, incumbent LECs argue that rebates are somehow incompatible with TELRIC pricing. Focal urges the Commission to reject that view since rebates are a useful marketing tool and are not inconsistent with a TELRIC cost standard. For example, a carrier operating at an inefficient volume level could rationally alter its cost structure through rebates, or through other forms of competition that would move it to more efficient volume levels.

Focal submits that the incumbent LECs' real source of unhappiness here is that they have lost out in the competition to sign up ISPs. However, this does not mean that there is something "uneconomic" or inappropriate about rebates that the Commission need address by now jury-rigging some unique scheme of intercarrier compensation for ISP-bound traffic.

E. Ameritech's "Cost Studies" Lack Any Merit.

Ameritech's assumption that the compensatory nature of all ISP-bound calls, not just interstate ISP-bound calls, can and should be assessed on a stand-alone, non-jurisdictional basis is fatally flawed. This approach improperly disguises the actual services that are generating revenues covering these costs. In particular, it disregards the appreciable amount of intrastate ISP-bound dial-up calling that exists. The costs of these intrastate ISP-bound calls are recovered from intrastate exchange tariffs (a matter which Ameritech does not dispute), while their associated interstate revenues (the SLC, the purchase of T-1s by ISPs, etc.), need to be attributed

---

also apparently solicited such arrangements over the Internet (*see* the April 23, 1999, posting of Mr. Ivan Sein of Cortel on isp-chat@isp-chat.com).

only to the portion ISP-bound traffic which is actually interstate. Ameritech's "non-jurisdictional" approach completely fails to carry this essential step.

The extent of intrastate ISP-bound traffic is not limited just to calls to corporate intranets. For example, as the FCC itself noted in its *NPRM*, the existence of near-caching of web pages means that many calls have an intrastate character even under the FCC's new jurisdictional analysis. Furthermore, even when an Internet query is directed to an out-of-state web site, the actual interstate "communication" time is usually quite short, usually just the amount of time needed to download the web page. Most of the overall contact time involves the end user reading web pages on a screen while only connected to a local modem. Those are plainly intrastate minutes.

Ameritech's "non-jurisdictional" cost analysis proceeds as though ISP-bound traffic constituted a distinct, separate service that could be analyzed on a stand-alone basis. But, as noted above, a substantial portion of this traffic is good old-fashioned local exchange traffic, and Ameritech makes no claim that its local exchange tariffs are non-compensatory.

Even if analyzing a subset of traffic within a single service were somehow appropriate (and Focal does not believe it is), Ameritech would still need to include the interstate SLC revenue from all the second lines purchased for ISP-bound traffic, as well as from T-1s and other interstate revenues generated by dial-up ISP demand, and then attribute those revenues to only the portion of ISP-bound traffic that is interstate in order to make a showing that interstate traffic is somehow burdening the intrastate jurisdiction. Having failed to do so, Ameritech's "cost studies" are meaningless.

III. THERE ARE NO LEGAL REASONS WHY INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC NEED BE DIFFERENT THAN RECIPROCAL COMPENSATION FOR OTHER TRAFFIC

A. The 8th Circuit's *Access Charge Order* Demonstrates that the Commission May Permit States to Regulate This Aspect of Interstate Communications

The Commission should reject incumbent LECs' arguments that it may not permit state regulation of rates for intercarrier compensation for ISP-bound traffic because it is jurisdictionally interstate. This is merely a restatement of their argument that was rejected by the Eight Circuit in finding that the "ESP exemption" was lawful even though it permitted states to regulate rates for some aspects of jurisdictionally interstate communications.[13] Focal submits that if the Commission has the discretion to allow states to supervise the rates by which ISPs use the local network for origination and termination of interstate communications, it may also defer to state supervision over reciprocal compensation for such traffic where this would not conflict with federal goals.[14] Focal submits that the fact two carriers are involved in handling this traffic where issues of intercarrier compensation are involved does not, and should not, affect the Commission's legal authority to allow states to continue to regulate in this area.

B. Permitting States To Continue to Regulate Would Not Constitute A Delegation Of Authority

The Commission should also reject incumbent LECs' claims that the Commission's proposal in the *NPRM* would involve an impermissible delegation of authority to states. Putting

---

[13] *Southwestern Bell v. FCC*, 153 F. 3rd 523, 542-43 (8th Cir. 1998).

[14] As noted before, Focal assumes here for purposes of these reply comments that dial-up calls to ISPs can be jurisdictionally interstate. Focal reserves the right to contest the Commission's jurisdictional determinations in the *Dial-Up Order*.

aside whether the ILECs are correct about the scope of permissible delegations of authority from the federal government to the states as a general matter, the Commission need not examine that area of jurisprudence because the Commission's proposal to permit states to continue to regulate in this area would not constitute a delegation of authority. Thus, there would be no transfer of authority or of regulatory programs from the Commission to the states. Rather, as with the approach the Commission took concerning state authority pending this rulemaking, the Commission would merely be determining that state supervision of intercarrier compensation for ISP-bound traffic would not conflict with any federal goal or rule. Thus, under the Commission's proposal, states would not be required or directed to regulate in this area. The Commission determined only that it would not conflict with federal rules for them to choose to do so as a voluntary matter and that, therefore, it would not be unlawful for a state to do so.[15]

Moreover, it would not constitute a delegation of authority for the Commission to determine the parameters within which states may voluntarily regulate without conflicting with any federal policy. For example, the Commission could determine that state regulation would not conflict with federal goals as long as a state conformed its determinations to federal rules governing reciprocal compensation generally. Thus, the Commission could determine on a going-forward basis that it would not conflict with federal goals if a state sets intercarrier compensation for ISP-bound traffic based on TELRIC. Further, if a state transgresses this guideline, the Commission could assert the paramount authority of the federal government under the Supremacy Clause to regulate this area of interstate commerce and preempt the state action.

---

[15] *Dial-Up Order* at ¶ 24.

Focal submits that identification of areas in which states may regulate, and preemption of any instances in which those guidelines are exceeded, does not constitute a delegation of authority to states because the Commission is merely determining the areas in which states may regulate in this area as a voluntary matter without thwarting federal objectives.

C. States Have Authority to Regulate

Moreover, even assuming *arguendo* that ISP-bound traffic is not subject to Section 251(b)(5), this would not prevent states from establishing intercarrier compensation pursuant to the negotiation and arbitration process of Sections 251 and 252. As a general matter, the Commission has recognized that the Telecommunications Act of 1996 ("1996 Act")[16] created a new regulatory paradigm in which the Commission would exercise some authority over some aspects of intrastate communications traditionally left to the states, and *vice versa*.[17] Thus, under Sections 251 and 252 states are not precluded from regulating interstate communications. Further, in the absence of any conflict with federal goals or rules, states may exercise their inherent authority to regulate entities operating in their states. Thus, for example, states exercise consumer protection regulatory oversight over interexchange carriers operating within their borders. The fact that interexchange carriers are offering jurisdictionally interstate service does not immunize them from state authority over their offering of service in a state if this would not otherwise conflict with federal objectives. Focal submits, therefore, that states may exercise

---

[16] Pub.L. 104-104, Title VII, Sec. 706, Feb. 8, 1996, 110 Stat. 153.

[17] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, ¶ 83-84 (1996) ("*Local Competition Order*").

their inherent authority over businesses operating in their borders to regulate intercarrier compensation for ISP-bound traffic where this would not conflict with federal objectives. Focal further submits that states may require carriers to negotiate and may impose mandatory arbitration in this area. Focal sees no reason why states could not choose to require, and the Commission could not permit, intercarrier compensation for this traffic to be treated as if it were formally subject to Section 251(b)(5).

In this connection, the Commission need not be troubled by Ameritech's claim that states may only regulate in this area if the state law permits it.[18] Other than unsupported allegations, Ameritech has provided no evidence that this is a likely prospect under state law. The comments from state commenters also suggest that this is not likely to be an issue.[19]

D. The Commission Can Require that Interstate Intercarrier Compensation Be the Same as State-Approved Reciprocal Compensation for Local Traffic

It is beyond dispute that the Commission has authority under Section 201 over incumbent LECs intercarrier compensation rates and practices for interstate traffic.[20] Therefore, to the extent the Commission has concerns about the extent to which states could require incumbent

---

[18] Ameritech Comments at 15-20 .

[19] *See, e.g.*, Comments of California Public Utilities Commission; Comments of New York State Department of Public Service. Indeed, it was the threat of the states asserting authority over deregulated interstate billing and collection services that caused the FCC to preempt any state attempts to assume regulatory authority in the absence of active federal supervision. This preemption would not have been necessary if the powers of the states were limited in the manner described by the ILECS. *Detariffing of Billing and Collection Services*, CC Docket No. 85-88, 102 FCC 2d 1150, 1176-77, recon. denied 1 FCC Rcd 445 (1986). *See also, Maryland Public Service Commission*, 2 FCC Rcd 1998 (1987).

[20] If ILECs were to attempt to continue exchanging ISP-bound traffic among themselves pursuant to their existing interconnection agreements, that fact would alone would empower both the FCC and the states to require the same treatment for CLECs under existing anti-discrimination statutes.

LECs to negotiate and arbitrate intercarrier compensation for ISP-bound calls, the Commission could merely require, as its regulation of interstate communications in this area, that incumbent LECs subject themselves to state authority, including participation in state-supervised negotiation and arbitration. Thus, the Commission could adopt as its rules in this proceeding that LECs' intercarrier compensation for ISP-bound traffic shall be as determined by state authorities for those states that choose to regulate in this area. The Commission could then regulate for itself in those instances where a state chose not to.

Alternatively, if the Commission wishes to establish a regulatory scheme that does not involve any state regulation of intercarrier compensation for interstate traffic, it could merely adopt as its federal rule governing intercarrier compensation for ISP-bound traffic that the intercarrier compensation for this traffic shall be the same as for reciprocal compensation for local traffic that the parties have negotiated or that states have arbitrated under Section 252. This would eliminate concerns that states are exercising authority over interstate communications because states would only be exercising authority over intrastate communications. It would be the Commission's exercise of its authority over interstate communications that would govern intercarrier compensation for ISP-bound traffic although the federal rate would be the same as the state rate. Focal submits that this would be an expedient and practical solution to any legal doubts that the Commission may have concerning the states's authority to regulate in this area.

Accordingly, Focal submits that there are no legal impediments to the Commission permitting states to regulate in this area. To the extent necessary, the Commission can merely determine that the federal rate for intercarrier compensation for ISP-bound traffic shall be the same as state rates for reciprocal compensation generally.

IV. THERE ARE NO POLICY REASONS WHY INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC NEED BE DIFFERENT THAN RECIPROCAL COMPENSATION FOR OTHER TRAFFIC

Focal respectfully suggests that there are no policy reasons that would require the Commission to establish a scheme of intercarrier compensation for ISP-bound traffic separate from state supervision of reciprocal compensation for local traffic generally. As noted by Focal and others in initial comments, the current approach to reciprocal compensation for ISP-bound traffic under which this traffic is treated the same as other local traffic and subject to state supervision has served the public interest.[21] This framework has been fully consistent with, and promoted, the spectacular growth of the Internet and its contribution to the telecommunications sector as a key United States economic success story.

Further, as discussed, there are no economic justifications that would justify a separate federal scheme or rate for intercarrier compensation for ISP-bound traffic. CLECs incur appreciable costs in handling this traffic and those costs are essentially no different than the costs of handling local calls generally. It promotes efficient market entry and network build-out decisions for intercarrier compensation for ISP-bound traffic to be treated the same as for other calls. In reality, rather than presenting a cogent case that the current framework of negotiated reciprocal compensation rates (which the ILECs themselves insisted on) is a matter of serious economic concern, incumbent LECs are merely unhappy that this traffic is imbalanced in competitive LECs' favor. However, this is a result of competitive LECs' success in competing

---

[21] Focal Comments at 1-3.

for ISPs' business, and not an indication of any economic distortions in treating intercarrier compensation for ISP-bound traffic the same as other local traffic.

Focal also points out that the National Association of Regulatory Utility Commissioners and many state commissions are actively seeking to continue state regulatory authority over this area. Thus, adoption of the Commission's tentative proposal would be fully consistent with state views and promote federal-state comity.

V. THERE ARE NO PROCEDURAL REASONS WHY INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC NEED BE DIFFERENT THAN RECIPROCAL COMPENSATION FOR OTHER TRAFFIC

A single framework governing intercarrier compensation for both ISP-bound and other traffic would be far more efficient than separate federal and state schemes. Parties negotiate intercarrier agreements comprehensively in light of the totality of interconnection arrangements between them. It would create an essentially unworkable framework for parties to be subject to two separate authorities governing these arrangements, inevitably resulting in the need to renegotiate some aspects of either the federal or state supervised interconnection agreement in light of the other jurisdiction's decision. Nor would it be feasible for state and federal regulators to closely coordinate the myriad interconnection agreements likely to be going on simultaneously. Accordingly, Focal submits that procedural considerations warrant adoption of the Commission's tentative proposal.

VI. INCUMBENT LEC CLAIMS THAT SECTION 252(i) HAS NO APPLICATION TO INTERCARRIER COMPENSATION FOR ISP-BOUND TRAFFIC ARE INCORRECT

The Commission should reject incumbent LECs' argument that because ISP-bound traffic is allegedly not subject to Section 251(b)(5), this traffic is therefore not subject to "opt-in" rights

under Section 252(i). Even if the exclusion of ISP-bound traffic from Section 251(b)(5) were correct (which Focal does not concede), the conclusion concerning Section 252(i) would not follow.

The Commission in its *Local Competition Order* interpreted Section 252(i) as having a wider application than just to matters governed by Section 251(c).[22] The Commission viewed Section 252(i) as an antidote to potential unreasonable discrimination by incumbent LECs in entering into interconnection agreements, especially given that they may be entering into agreements with affiliates, and, therefore, contemplated that competitive LECs' "opt-in" rights apply to any provision in interconnection agreements. Thus, the Commission ruled, for example, that interconnection agreements between adjacent incumbent LECs are subject to Section 252(i) even though most of the matters within such agreements do not involve provision of services subject to Section 251(c).[23] Nearly every forum that has looked at this issue has determined that any provision of interconnection agreements is subject to "opt-in." Moreover, a unanimous United State Supreme Court affirmed the Commission's "opt-in" rules.[24]

Even if there were any technical impediments to including intercarrier compensation for ISP-bound traffic within Section 252(i), this would not have any practical implications given the existence of the Commission's robust authority to prevent anti-competitive discrimination. Using its organic authority over interstate traffic, the Commission could simply adopt the language of section 252(i) and the authorities interpreting that section as a separate anti-

---

22 *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 176.

23 *Id.* at ¶ 1323.

24 *See AT&T v. Iowa Utilities Board*, 119 S.Ct. 721, 738 (1999) ("*Iowa Utilities Board*").

discrimination measure that would be applicable to any contract provisions pertaining to intercarrier compensation for ISP-bound traffic in any interconnection agreements approved by the states. This would produce precisely the same effect as a finding that Section 252(i) is directly applicable, and not implicate any of the many, but incorrect, claims raised by the ILECs concerning the scope of Section 252(i). Therefore, the Commission should conclude that section 252(i) is fully applicable to this form of intercarrier compensations, and further conclude that if section 252(i) is ever found not be applicable by a competent court, the language of section 252(i) is independently adopted by the Commission under its own authority as a measure intended to prevent discrimination in this area.

VII. THE COMMISSION SHOULD REJECT REQUESTS FOR NEW PRICE CAP OR SEPARATIONS TREATMENTS

The Commission should reject requests by Ameritech and other incumbent LECs that the Commission's finding that dial-up calls to ISPs can be jurisdictionally interstate warrant a new separations or price cap treatment of the costs or cost recovery mechanisms associated with this traffic. First, contrary to the assumptions underlying these requests, there is no reason to assume that all or most of ISP-bound traffic is interstate or that it would be impossible to establish reasonable estimates or measurements of this traffic so that only some of this traffic could be subject to interstate regulatory treatment. As discussed above and as has been pointed out in other proceedings, a significant percentage of this traffic is intrastate because of "caching" and "mirroring" of frequently visited web sites.[25] One party submitted a study of Internet usage that

---

[25] MCI WorldCom Petition for Reconsideration, CC Docket No. 98-79, filed November 30, 1998; KMC Comments, CC Docket No. 98-79, filed Juanuary 5, 1999.

found that, in fact, most ISP-bound traffic is intrastate although the Commission did not acknowledge this finding.[26] Focal submits that what evidence the Commission does have suggests that a great deal of ISP-bound traffic is intrastate. Thus, treatment of all of ISP-bound traffic as interstate for separations or cost recovery purposes would be inappropriate even if that were otherwise the correct regulatory treatment of this traffic.

Moreover, there is no justification for establishing a special interstate recovery mechanism for this traffic because Ameritech has not experienced any new interstate costs. These costs continue to be allocated to the intrastate jurisdiction. Until these costs are reallocated to the interstate jurisdiction there are no additional interstate costs that could require interstate recovery. Ameritech is free to recover its costs on the intrastate side to the extent permitted under applicable state rules and regulations.

Further, there is no basis in this proceeding for the Commission to consider the need for separations changes for this traffic. As long as the "ESP exemption" continues in effect, ISPs will continue to use intrastate services to connect to the network, and thus it is appropriate that incumbent LEC costs of providing those services be treated as intrastate for both separations and cost-recovery purposes.

Focal points out above that Ameritech has failed to show that it is not recovering its costs of handling ISP traffic or that its reciprocal compensation obligations represent a subsidy to competitive LECs. The only reason that Ameritech gives for the claim that it does not recover

---

[26] Hyperion Reply Comments, CC Docket No. 98-79, filed January 18, 1999.

its costs is that the average length of a call to an ISP is longer than a dial-up voice call.[27] However, its cost showing is apparently only submitted on a per line basis. Thus, Ameritech only shows that some customers use of the network results in more costs than others. Ameritech has failed to show that on an aggregate basis it is not recovering its costs from end users in intrastate rates. Accordingly, the Commission should reject Ameritech's showing that it is not recovering its costs.

Focal also stresses that it disagrees strongly with the view of some commenters that the percentage of interstate and intrastate ISP-bound traffic cannot be identified for separations purposes. As incumbent LECs have recognized, separations is an imprecise exercise and the percentage of interstate usage for ISP-bound traffic could be estimated, as is done for local loop usage for interstate voice traffic. Such an estimate might be achieved, for example, by starting with an appropriate statistically valid sample of dial-up ISP callers and then recording the web sites contacted by these callers over a suitable period of time, and including the amount of time that the caller is actually connected to the web site server. The geographic location of these web sites could then be established and the results calculated to determine a percentage of interstate usage. Focal submits that this approach or some other approach is necessary before the Commission can further consider incumbent LECs' requests for sweeping regulatory changes governing separations and cost recovery for ISP-bound traffic. To date, the Commission has not begun to address the proper ways to estimate interstate/intrastate usage for ISP-bound traffic.

---

[27] Ameritech Comments p. 10.

VIII. CONCLUSION

For these reasons, the Commission should adopt the recommendations set forth in these Reply Comments.

Richard Metzger
Vice President, Regulatory Affairs
and Public Policy
Focal Communications Corporation
1120 Vermont Ave, NW
Terrace Level (202) 424-7500
Washington, DC. 20005
(202) 293-7050

Richard M. Rindler
Patrick J Donovan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Counsel for Focal Communications, Inc.

Dated: April 27, 1999

279998.1

CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that on this 27th day of April 1999, copies of the foregoing Reply Comments of Focal Communications Corporation were delivered by hand and first class mail to the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C.

Diskette Only To:
Wanda Harris
Common Carrier Bureau, Competitive Pricing Div.
Federal Communications Commission
445 Twelfth Street, S.W. - Fifth Floor
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Jane Jackson
Chief, Competitive Pricing Division
Federal Communications Commission
The Portals
445 12th Street - Fifth Floor
Washington, DC

Richard Lerner
Deputy Chief, Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W. - Room 518
Washington, DC

Tamara Preiss
Competitive Pricing Division
Federal Communications Commission
The Portals
445 12th Street - Fifth Floor
Washington, DC

Ed Krachmer
Competitive Pricing Division
Federal Communications Commission
1919 M Street, N.W. - Room 518
Washington, DC

Candise M. Pharr